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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 309

NICHOLAS J. TWEEL,

Appellant,

vs.

WEST VIRGINIA RACING COMMISSION, A STATUTORY CORPORATION, ET AL.

APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATEMENT AS TO JURISDICTION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 309

NICHOLAS J. TWEEL,

Appellant,

vs.

WEST VIRGINIA RACING COMMISSION, A STATUTORY CORPORATION; JAMES F. EDWARDS, CHAIRMAN AND MEMBER; FRANK BROOKE, VICE-CHAIRMAN AND MEMBER, AND RALPH LaPORE, MEMBER, OF WEST VIRGINIA RACING COMMISSION,

Respondents

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, appellant submits herewith his statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final judgment and decree of the Supreme Court of Appeals of West Virginia entered in this cause.

Opinion Below

This is a proceeding in mandamus in which appellant invoked the original jurisdiction of the Supreme Court of

Appeals of West Virginia. The opinion of that Court denying the writ of mandamus prayed for by appellant is reported in — W. Va. —, 76 S. E. 2d 874. A copy of the Court's opinion is attached hereto as Appendix A. A copy of the final judgment and decree of the Court is attached hereto as Appendix B.

Jurisdiction

The judgment of the Supreme Court of Appeals of West Virginia was entered on June 30, 1953. A petition for appeal is presented to the presiding Judge of the Supreme Court of Appeals of West Virginia herewith—to-wit, on August 12, 1953. The jurisdiction of the Supreme Court of the United States to review this decision by appeal is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court of the United States to review the judgment on appeal in this case: *Hartman* v. *Greenhow*, 102 U. S. 672; *McPherson* v. *Blacker*, 146 U. S. 1.

Nature of the Case

West Virginia Racing Commission, acting by and through its members, all of whom are appellees, refused to issue a license to appellant to hold horse race meetings at appellant's race track now under construction. Such refusal was based *solely* on appellant's non-compliance with a statute of West Virginia.

This suit is a proceeding in mandamus in the Supreme Court of Appeals of West Virginia, by which appellant seeks an order requiring West Virginia Racing Commission to issue to him a license to hold horse race meetings at his race track now under construction, it being appellant's contention that the statute on which appellees' refusal to grant such license is based is invalid, because it denies to appellant the equal protection of the laws, in

contravention of the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of Appeals of West Virginia denied the writ prayed for, holding that the statute is a valid exercise of the police power and is not in contravention of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Raising the Federal Question

Appellant raised the federal question involved in his original and amended petitions for a writ of of mandamus filed with the Supreme Court of Appeals of West Virginia. Sub-paragraph (a) of paragraph XIII of said original and amended petitions reads as follows:

> "(a) Said Bill is in violation of Sections 1 and 10 of Article III of the Constitution of West Virginia and is in violation of the Fourteenth Amendment to the Constitution of the United States, because it denies to petitioner the means of acquiring and possessing property, it deprives petitioner of property without due process of law, and it denies to petitioner the equal protection of the laws; * * *"

The prayer for relief contained in appellant's original and amended petitions filed with the Supreme Court of Appeals of West Virginia requested an adjudication that the statute involved is unconstitutional, said prayer for relief reading in part as follows:

> "Wherefore, your petitioner, being without any other sufficient and adequate remedy, now prays that, upon a hearing of this cause, this Court adjudge said Senate Bill No. 127 to be unconstitutional and void for the reasons aforesaid, * * *."

Appellees in their answer admitted all of the allegations of appellant's original and amended petitions except the

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allegation that the statute in question is unconstitutional. Thus the sole question before the Supreme Court of Appeals of West Virginia was the constitutionality of the West Virginia statute.

The Supreme Court of Appeals of West Virginia decided that the statute in question did not violate the Constitution of the United States, and was valid. That Court said (Appendix A):

> "Petitioner contends that the attempt of the Legislature, in the 1953 Act, to require petitioner to submit to a local option election discriminates against him, since the licensees of the existing race tracks are not so required, and that any classification as to those licensed at the time of the effective date of the Act and those not licensed is arbitrary, without any reasonable basis, and not founded upon any material or logical purpose in connection with the enforcement of the Act. We do not agree."

Statute of the State Involved

The statute of the State of West Virginia the validity of which is involved in Chapter 112, Acts of the Legislature, Regular Session, 1953 (Senate Bill No. 127), now incorporated in the Official Code of West Virginia of 1931 in Chapter 19 as Article 24. For the sake of brevity, it will be referred to hereinafter as Code 19-24. Said statute is set forth in Appendix C. It provides, in effect, that no one may engage in the business of horse racing with pari mutuel wagering in West Virginia unless the voters of the county in which the race track is to be located shall first have had the opportunity of voting upon the question of whether or not such racing shall be allowed, and if a majority of the voters at such election are opposed to such racing, it will not be allowed. However, the statute expressly excepts from its operation and effect the race tracks (three in number) in said State which were operated prior

to the effective date of the statute (see Section 6, Appendix C). Thus the owners and operators of three race tracks are saved from the hazard of a local option election, whereas all others must submit to that hazard before engaging in said business.

Question Presented

Where a statute provides for the holding of local option elections to determine whether or not a race track may be constructed, and therefore whether or not horse race meetings may be held, but such statute exempts from its provisions race tracks in existence prior to the enactment of the statute at which horse race meetings have been held, is there a denial to appellant, the owner of a race track under construction at the time of the enactment of the statute, of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States?

Statement of the Case

The facts summarized below are pleaded in the original and amended petitions for a writ of mandamus or appear in the Official Code of West Virginia, and are admitted by appellees' answer to such original and amended petitions.

Horse racing, with the pari mutuel system of wagering, is a lawful business in West Virginia (See Chapter 71, Acts of the Legislature of West Virginia, 1935, Official Code of West Virginia 1931, Chapter 19, Article 23). The West Virginia Racing Commission, a statutory corporation, hereinafter called the Commission, is charged with the duty of licensing and regulating horse race meetings within said State.

Prior to the enactment of Code 19-24, the statute in question, there was no requirement for a permit for the construction of a race track, nor was there any requirement for the holding of a local option election to sanction the

construction of a race track and the holding of horse race meetings. Under the West Virginia law prior to the enactment of Code 19-24, anyone desiring to hold a horse race meeting had merely to apply to the Commission and obtain a license therefor.

On January 8, 1952, appellant was informed by letter from the Commission that the Commission would look with favor upon and would issue a license for horse race meetings to be conducted at a race track which appellant proposed to build near the Town of Hurricane, West Virginia. Relying upon said letter, appellant began the construction of his race track. He procured approximately one hundred twenty acres of land near said Town of Hurricane. He employed a firm of civil engineers and had the land surveyed and detailed maps and all other work usually done by such engineers completed. He employed a firm of architects to prepare detailed specifications for the construction of the race track, the grand-stand, and other buildings, and this work was entirely completed. He employed a firm of electrical engineers to prepare detailed plans and specifications for lighting fixtures to accommodate night racing at his race track, and that work was completed. He entered into certain contracts with underwriters for the purpose of obtaining the necessary financing to complete the construction of his race track.

Prior to January 1, 1953, appellant had spent more than $37,500.00, exclusive of the cost of the land, in the construction of his race track. However, because of certain regulations and orders promulgated by the National Production Authority restricting the use of steel in the construction of race tracks, appellant was unable to complete the construction of his race track prior to the enactment of the statute in question (said statute was enacted March 7, 1953). By the time said statute was enacted said regulations and

orders were rescinded, and appellant was ready and able to complete the construction of his race track.

Realizing that this could be done prior to October 1, 1953, appellant, on April 8, 1953, applied to the Commission for a license to conduct horse race meetings at his race track for certain dates during the years 1953, 1954, 1955, and 1956. On April 13, 1953, the Commission denied appellant's application for a license *on the sole ground* that appellant had not complied with the provisions of Code 19-24 (also known as Senate Bill No. 127). The Commission's denial was contained in a letter to appellant dated April 13, 1953, which letter is set forth in its entirety in appellant's original and amended petitions. The Commission said, in part—

> "We * * * find your application to be in due form, and it meets with the unqualified approval of the Commission, but it is necessary for us to decline to issue the license for which you have applied because of the enactment by the West Virginia Legislature on March 7, 1953, of Senate Bill No. 127, * * *."

The statute referred to by the Commission, which is in question in this cause, Code 19-24, provides in substance that no race track shall be constructed in West Virginia unless the person proposing to construct the track first applies to the Commission for a construction permit. The statute then provides for the submission of the question of whether or not such permit shall be granted to the voters of the county in which the proposed race track is to be located, and that such permit shall not issue if a majority of the voters oppose it. However, the statute expressly excepts from its operation and effect the race tracks in said State which were operated prior to the effective date of the statute (see Appendix C). Prior to said date three race tracks had been operated in West Virginia, and were

thus exempt from the hazard of a local option election. Said race tracks are at Wheeling in Ohio County, Charles Town in Jefferson County, and Chester in Hancock County.

Upon receipt of said letter from the Commission, appellant, believing Code 19-24 to be unconstitutional and void, promptly petitioned the Supreme Court of Appeals of West Virginia for a writ of mandamus to compel the Commission to issue a license to appellant, since its refusal to issue the license was based solely upon said statute. Appellant alleged in his petition that said statute denies him the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States, because it requires him to submit to the hazard of a local option election to determine whether or not he may complete his race track and engage in the business of horse racing, whereas the owner of a similar track at Wheeling and the owners of two other tracks mentioned above are exempt from such hazard, and said statute tends to give them a virtual monopoly of the horse racing business in West Virginia.

The Question Is Substantial

Because of certain statements made in the opinion of the Supreme Court of Appeals of West Virginia (Appendix A), it should be noted that Code 19-24 is not a mere procedural reform with respect to the licensing of persons who may wish to engage in the horse racing business. It is an atepmt to place all persons who may wish to engage in that business in two separate classes—one class composed of persons who have engaged in such business prior to an arbitrary date, and the other class composed of persons who may engage in said business subsequent to such date. The qualifications of such persons with respect to engaging in said business are not involved. Such qualifications are regulated by Code 19-23. A person desiring to engage in

said business after the arbitrary date may possess qualifications for holding horse race meetings identical with, or even superior to, a person who was engaged in said business prior to such date. Yet the former may be denied the right to engage in such business, because of the local option requirement, to which the latter is not subjected.

Since Code 19-24 determines who may engage in the business of horse racing in the State of West Virginia, the sole question here considered is whether or not the Legislature of that State, by protecting the race track at Wheeling and the other two tracks mentioned above from the hazard of local option elections while subjecting appellant to such hazard, denied to appellant the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States. Put more precisely, the question is—Where individuals are engaged in the same business and affect the community in exactly the same manner and degree, may those who conducted their business prior to an arbitrary date be allowed to continue to do so without the sanction of a majority of the citizens voting in a local option election, while those who enter the field after the arbitrary date are required to obtain the approval of a majority of the citizens in a local option election?

Admittedly, the regulation of horse racing is within the scope of the police power of the State. *State* v. *West Virginia Racing Commission*, 133 W. Va. 179, 55 S. E. 2d 263; *People* v. *Monroe*, 349 Ill. 270, 182 N. E. 439; *State Racing Commission* v. *Latonia Agriculture Assn.*, 136 Ky. 173, 123 S. W. 681. Nevertheless this power is restricted by and subject to the basic guaranties against oppressive state legislation contained in the Fourteenth Amendment to the Constitution. *Mayflower Farms* v. *Ten Eyck*, 297 U. S. 266; *Skinner* v. *Oklahoma*, 316 U. S. 535; *Hartford Steam Boiler*

Inspection & Insurance Company v. *Harrison*, 301 U. S. 459; *Smith* v. *Cahoon*, 283 U. S. 553.

One of the most important guaranties against arbitrary and unjust state legislation is the equal protection clause of the Fourteenth Amendment, which declares that no state "shall deny to any person within its jurisdiction the equal protection of the laws." As interpreted by the Supreme Court of the United States, the equal protection clause requires that states in the exercise of the police power must not discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. *Mayflower Farms* v. *Ten Eyck*, 297 U. S. 266; *Smith* v. *Cahoon*, 283 U. S. 553; *Air-Way Electric Appliance Corp.* v. *Day*, 266 U. S. 71; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32, 37.

It is the position of appellant that all race tracks are of the same genus, regardless of whether constructed before or after the adoption of Code 19-24. Perhaps race tracks might reasonably be classified with respect to the length of the track or the size of the grand-stand or the amount of purse offered, but to attempt a classification based on the date on which the track began to operate seems arbitrary and unreasonable beyond dispute.

It is further the position of appellant, if it be admitted that race tracks may be deemed by some to be detrimental to the public morals, that race tracks, whether constructed prior or subsequent to Code 19-24, contribute to the alleged evil in precisely the same way and to the same degree. Manifestly it follows that a classification can have no reasonable relation, or indeed any relation at all, to the legislative end or purpose where it subjects one person to a local option election, if such person desires to operate a race track, and allows another person similarly situated to

operate a race track without the sanction of a local option election merely because he happens to have operated a race track prior to an arbitrary date.

We believe that the decision of this case is controlled by *Mayflower Farms* v. *Ten Eyck*, 297 U. S. 266. In that case the Supreme Court of the United States considered the constitutionality of the New York Milk Control Act, N. Y. Laws 1933, c. 158, §317 (c), which purported to fix minimum prices for sales of milk in bottles by dealers to stores in cities of more than one million inhabitants. The statute provided in substance that dealers who had, prior to the enactment of the statute, been engaged continuously in the business of selling milk and who did not have a well advertised trade name, could sell milk at a price one cent less than the minimum price. The appellant, a milk dealer, had not engaged in the sale of milk prior to the enactment of the statute, nor did he have a well advertised trade name. Appellant had applied for a license to sell milk, and such license had been denied by the Commissioner of the Department of Agriculture and Markets of the State of New York on the ground that the appellant had sold milk contrary to the statute at a price one cent below the minimum price, whereas by the terms of the statute appellant was not allowed this price differential, because he had not engaged continuously in the business of purchasing and handling milk prior to the enactment of the statute. The Court held the statute unconstitutional insofar as it applied to appellant, because the classification was arbitrary and unreasonable and denied appellant the equal protection of the laws. The Court in its opinion stated—

> "We are referred to a host of decisions to the effect that a regulatory law may be prospective in operation and may except from its sweep those presently engaged in the calling or activity to which it is directed. Examples are statutes licensing physicians and dentists,

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which apply only to those entering the profession subsequent to the passage of the act and exempt those then in practice, or zoning laws which exempt existing buildings, or laws forbidding slaughter houses within certain areas, but excepting existing establishments. *The challenged provision is unlike such laws, since, on its face, it is not a regulation of a business or an activity in the interest of, or for the protection of, the public, but an attempt to give an economic advantage to those engaged in a given business at an arbitrary date as against all those who enter the industry after that date.* The appellees do not intimate that the classification bears any relation to the public health or welfare generally; that the provision will discourage monopoly; or that it was aimed at any abuse, cognizable by law, in the milk business. In the absence of any such showing, we have no right to conjure up possible situations which might justify the discrimination. The classification is arbitrary and unreasonable and denies the appellant the equal protection of the law." (Emphasis added).

All that the Court said in the foregoing quotation is peculiarly applicable here. In the present cause the appellees answered the appellant's original and amended petitions, and *admitted every allegation of such petitions* save only that Code 19-24 is unconstitutional. The precise language quoted above is applicable here—"The appellees do not intimate that the classification bears any relation to the public health or welfare generally; that the provision will discourage monopoly; or that it was aimed at any abuse, cognizable by law * * *." And then the Court said, as quoted above—"In the absence of any such showing, we have no right to conjure up possible situations which might justify the discrimination. The classification is arbitrary and unreasonable and denies the appellant the equal protection of the law."

We respectfully submit that Code 19-24 reaches the same discriminatory result as the statute condemned in the *Mayflower Farms* case, for Code 19-24 is not a statute enacted for the protection and welfare of the people of the State of West Virginia, but an attempt to give an economic advantage, and indeed a virtual monopoly, to those persons engaged in conducting horse race meetings at an arbitrary date against all those who would enter the same business after such date.

There are many decisions of lesser courts which have held unconstitutional statutes which purported to classify persons similarly situated merely on the basis of their existence or non-existence in a given field of conduct at an arbitrary date. Thus in *Standard Oil Co. of New Jersey* v. *City of Charlottesville* (C. C. A. 4th), 42 F 2d 88, the Court held a municipal ordinance invalid which prohibited gasoline stations from being erected in fire zones within a prescribed distance of any residence, but exempted from its provisions all existing gasoline stations. In its opinion the Court stated—

> "A classification manifestly has no such reasonable relation where it forbids one person to carry on a business on the ground that it is dangerous to the community, and allows another person similarly situated to carry on the same business simply because he happens to be engaged in it at the time of the passage of the ordinance."

To this same effect see *Town of Clinton et al* v. *Standard Oil Co.*, 193 N. C. 432, 137 S. E. 183; *MacRae* v. *City of Fayetteville*, 198 N. C. 51, 150 S. E. 810; *State of Wisconsin ex rel. F. W. Woolworth Co.* v. *State Board of Health*, 237 Wis. 638, 298 N. W. 183; *State ex rel. Ford Hopkins Co.* v. *Watertown*, 226, Wis. 215, 276 N. W. 311; *Crowley* v. *West*, 52 La. Ann. 526, 27 So. 53; *County of Los Angeles* v. *Hollywood Cemetery Association*, 124 Cal. 344, 57 P. 153.

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We respectfully urge that the statute in question denies appellant and other citizens of West Virginia the equal protection of the laws and, either by design or by inadvertence, tends to grant a virtual monopoly to the owners of three existing race tracks. The resulting financial loss to appellant is substantial, but the flagrant violation of the Constitution is of greater moment. Therefore we believe that the question presented by this appeal is substantial, and is of public importance.

Respectfully submitted,

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CAMPBELL, MCNEER and
WOODS,
Of Counsel.

APPENDIX "A"

OPINION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 10585

NICHOLAS J. TWEEL

v.

WEST VIRGINIA RACING COMMISSION, ETC., ET AL.

In Mandamus— Writ denied

Judge Lovins Concurs and Reserves the Right to File a Concurring Opinion

GIVEN, *Judge:*

1. Horse racing where pari-mutuel wagering is conducted may be regulated or prohibited by the State, through the Legislature, under the police power.

2. The exercise of the police power in the regulation of any business is subject to the due process provisions of the Federal and State Constitutions.

3. A statute enacted for the purpose of regulating horse racing, to be constitutional, must not discriminate against any person of the class to which the statute applies; all persons of the same class must be treated substantially alike.

4. The equal protection provisions of the Federal and State Constitutions do not preclude resorting to classification for purposes of legislation if such classification is reasonable, is founded upon pertinent and real differences, and has as its object a purpose germane to the legislation.

5. "A very wide discretion must be conceded to the legislature in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an exercise or license tax." Point 5, *State Board of Tax Commissioners v. Jackson*, 283 U. S. 527.

6. Chapter 112 of the 1953 Acts of the Legislature, now Code, 19-24, relating to regulation of horse racing, is not

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discriminatory for the reason that it exempts race tracks theretofore existing from requirements relating to the holding of local option elections.

7. Chapter 112 of the 1953 Acts of the Legislature, now Code, 19-24, relating to regulation of horse racing, is not a special Act within the meaning of Section 39 of Article VI of the State Constitution, notwithstanding the Act exempts from its provisions relating to local option elections operators of race tracks theretofore licensed to hold horse race meetings.

8. "Unless the question is free from doubt, it is the duty of courts to uphold legislative acts as constitutional." Point 6, Syllabus, *Booten v. Pinson*, 77 W. Va. 412.

GIVEN, *Judge:*

In this original proceeding in mandamus Nicholas J. Tweel, petitioner, seeks the issuance of a writ commanding the defendant, West Virginia Racing Commission, "to issue a license to petitioner to conduct a horse racing meeting at petitioner's race Track", to be constructed partly in Cabell County and partly in Putnam County, West Virginia. An application for the license was made by petitioner and refused by the commission, for the reasons set forth in a letter to petitioner, dated April 13, 1953, in the following language:

"We acknowledge receipt of your letter of April 8, 1953, which constitutes an application for license to hold or conduct a Horse race meeting at the track you are in the process of constructing near Hurricane in Cabell and Putnam Counties.

"We, the newly formed Commission, made up of J. F. Edwards, Chairman, Frank Brooke, Vice-Chairman, and Ralph LePore, Member, find your application to be in due form, and it meets with the unqualified approval of the Commission, but it is necessary for us to decline to issue the license for which you have applied because of the enactment by the West Virginia Legislature on March 7, 1953, of Senate Bill No. 127, which is effective ninety days from passage.

"While we recognize the fact that you were in process of constructing this track prior to the date of the passage of said act, and, in fact, prior to the beginning of the last Legislature, nevertheless, because the construction of this track cannot be completed prior to the effective date of this act, and also because you will not have held race meetings at the track prior to the effective date of the act, we believe you are subject to the act, and it will be necessary for you to make application for a construction permit in accordance with the terms of this legislation."

No issue of fact is involved. The answer of defendants admits the material facts alleged in the petition, but says that the Act of the Legislature mentioned in the letter quoted above is constitutional. Petitioner contends that the Act of the Legislature is violative of the due process provisions of the Federal and State Constitutions, as being discriminatory, and also violative of Section 39, Article VI, of the State Constitution, as being, in effect, a special Act, where a general Act would have been proper.

The Act in question, Chapter 112, was passed by the Legislature on March 7, 1953. It became effective ninety days after passage. It simply amended Chapter 19 of the Official Code by adding thereto Article 24. The Act specifically provided that it was "supplementary and in addition to article twenty-three * * * and nothing herein contained shall relieve the person desiring to conduct a horse race meeting, where the pari-mutuel system of wagering is followed, at either an existing race track or one which shall be hereinafter established, of the necessity of securing the license therefor and otherwise complying with all of the terms, provisions and conditions of article twenty-three of this chapter." Prior statutes dealing with regulation of the business of horse racing were not repealed or amended. Section 1 of the Act of 1953 requires that no person, after the effective date of the Act, should "construct a race track where horse race meetings are to be held and the pari-mutuel system of wagering conducted * * * unless and until such person shall first have applied for and obtained" from the racing commission a construction permit. After considera-

tion of the application the commission is required to enter an order giving "tentative approval" or showing refusal of the license. In the event "tentative approval" is given, the commission is required to prepare and publish a notice of that fact and of the further fact that "a construction permit" will be issued to applicant at the expiration of sixty days from the date of the first publication of the notice, unless with said time an application for a local option election shall have been filed with the county court of the county in which said race track is proposed to be established * * *."

Sections 2 and 3 provide the manner in which a county court shall hold such local option election. In Section 3 it is provided that after the votes cast shall have been canvassed by the county court and the results certified to the racing commission, "thereupon said commission shall issue or refuse to issue the construction permit in accordance with the results of such local option election."

Section 4 furnishes a form for the ballot to be used at the local option election. Section 5 inhibits the holding of any other such election within the county for a period of five years following the holding of such an election, inhibits the racing commission from considering any other application for such a construction permit within that period, and further provides: "In the event a race track shall be constructed in a county pursuant to a construction permit issued by the West Virginia racing commission in accordance with the provisions of this article, no local option election shall thereafter be held as to any race track constructed pursuant to such construction permit."

The part of Section 6 of the Act alleged to render it unconstitutional is quoted: "Nothing herein contained shall apply to any race track heretofore established in the state of West Virginia and at which races have been conducted by the owners or operators thereof under and in pursuance of licenses issued by the West Virginia racing commission in accordance with the provisions of article twenty-three of this chapter. The establishment of any new or additional race track within a county in West Virginia under licenses issued by the West Virginia racing commission, whether

by the persons owning and operating such existing race track or others, shall be subject to the provisions of this article * * *." Section 7, the only other section contained in the Act, defines certain terms used therein.

Prior to the passage of the Act of 1953, the law governing horse racing where pari-mutuel wagering is permitted was Chapter 71 of the Acts of the Legislature of 1935, now Code, 19-23, as amended. That Act contained no provision relating to any "construction permit" of any race track or facilities. It is provided in that Act, however, that before any "horse race meeting" where pari-mutuel betting is had, the person intending to hold the same shall first obtain a license therefor from the racing commission. The requirements and procedure to obtain such a license are set forth in Section 5 of the 1935 Act, reading:

"Any person desiring to conduct a horse race meeting within the state of West Virginia and to permit or conduct pari-mutuel pools shall apply to the West Virginia racing commission for a license to do so. Such application shall be filed with the commission at least thirty days prior to the first day of each horse race meeting which said person proposes to hold or conduct. The commission shall prescribe blank forms in making such applications. Such application shall specify the days upon which said race meeting is to be conducted. It shall state the name of the person making such application, the post office address of the person making such application, the number of days he intends to hold or conduct such meeting (which shall be successive week days, excluding Sundays), and the location of the place or track or enclosure where he proposes to hold or conduct such race meeting, and shall supply such other data and information as the commission shall prescribe.

"Within ten days after the filing of such application with the commission, the commission shall grant or reject any application for a license for any cause deemed by it sufficient. If said license is refused, said commission shall publicly state its reasons for the refusal, and said reasons shall be written in full and attached to the application so refused, which refusal and reasons for same shall, at all times, be subject to inspection upon application of anyone

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desiring to inspect same. Said findings shall be subject to review by mandamus in any court of this state having jurisdiction, with the right to appeal to the supreme court of appeals in the manner prescribed by law."

Prior to January 8, 1952, petitioner had inquired of members of the racing commission whether a license would probably be issued for the holding of horse race meetings in the southern part of West Virginia, in the event of the construction of a modern horse race track and facilities and, on that date, the commission wrote petitioner as follows:

"The Bearer of this statement, Nicholas J. Tweel, and Associates of Huntington, West Virginia, have this day submitted to the West Virginia Racing Commission a proposal to build a night Harness Race Track on Route #60 in the vicinity of Huntington or Charleston, West Virginia.

"The West Virginia Racing Commission will issue a license; provided, Mr. Tweel and Associates erect a modern plant with pari-mutuel betting equipped with a totalisator, to be approved by the Commission. If the Construction of the plant is modern and has the facilities for good racing, public accommodations for their patrons and, in other words, modern in every respect, the West Virginia Racing Commission will issue a license and authorize dates as requested and suggested for May, June, September and October.

"The West Virginia Racing Commission will assist in every way possible in helping to build this modern plant and lend their good will to the success of this venture.

"Respectfully,

"West Virginia Racing Commission,
"(S) Mont. M. McIntire, Chairman,
"(S) Gordon P. Fought, Member,
"(S) Bethel Adkins Secretary.

"The West Virginia Racing Commission has further agreed to permit Mr. Tweel and Associates the choice of night thoroughbred racing if preferred to Harness or trotters with choice and length of dates as desired."

It is not contended now that petitioner acquired any right or privilege by virtue of the letter of January 8, 1952, which would in any way interfere with the right or power of the Legislature to enact the particular statute involved, and we think no such right or privilege exists. However, subsequent to the receipt of this letter, and prior to the convening of the 1953 session of the Legislature, petitioner purchased one hundred and twenty acres of land, partly in Cabell County and partly in Putnam County, with the intention of constructing and operating a horse race track thereon and, in addition to the cost of the land, expended approximately $37,500.00 in initial work in preparing for the construction of the track and facilities.

At the time of the passage of the 1953 Act, three horse tracks existed in West Virginia, one each in the counties of Ohio, Hancock and Jefferson, all in the northern part of the State. Licenses had been theretofore issued for the holding of horse race meetings at each of such tracks, and such meeting had been held. The record does not indicate that any application for any such license, other than that of petitioner, had ever been made for the holding of such a meeting at any point in the southern part of the State.

It may help toward clarity to note here certain facts believed significant: Any license for the holding of a horse race meeting at which pari-mutuel betting is permitted, whether the meeting is to be held at a track existing before the passage of the 1953 Act, or constructed subsequent thereto, would issue by virtue of Section 5 of the 1935 Act, quoted above, and all licensees would acquire the same rights and privileges under such a license, subject to such restrictions as made by the racing commission pursuant to authority vested in it by that Act. No requirement existed as to any race track construction permit at the time of the licensing of the three existing race tracks, and continuance of the three existing race tracks is not made to depend upon the result of any local option election. The 1953 Act requires that a local option election be held as to any new race track in the counties where there existed, at the time of the passage of the Act, a race track, as well as in counties where no race track existed. Requirements of the 1953

Act relating to local option elections are made applicable to petitioner and to all applicants for licenses who apply subsequent to the effective date of that Act, while no such requirements were ever applicable to licenses granted to the owner of existing race tracks.

There can be no question, and petitioner concedes, that the State, under its police power, may regulate or prohibit horse racing where pari-mutuel wagering is permitted. This is succinctly stated in the opinion in *State* v. *West Virginia Racing Commission*, 133 W. Va. 179, page 192, 55 S. E. 2d 263, in the following language: "There cannot, in our opinion, be any doubt as to the power of the Legislature to regulate horse racing, nor does there seem to be any contention on that point. Whatever may be said in favor of horse racing, and much can be said, it must be admitted that great evil attends its practice, such as calls for the intervention of the State, under its police power, to the end that such evil be minimized so far as it is possible to do so. This intervention and control is exercised under the police power of the State, and the use of that power rests with the Legislature. The police power is broad and sweeping, inherent in sovereignty and, except as restricted by constitutional authority, or natural right, which, in effect, is unlimited * * *." See 16 C. J. S., Constitutional Law, Sections 472, 473; *State Racing Commission* v. *Latonia Agriculture Assn.*, 136 Ky. 173, 123 S. W. 681; *People* v. *Monroe*, 349 Ill. 270, 182 N. E. 439; *State* v. *Thompson*, 160 Mo. 333, 60 S. W. 1077, 54 L. R. A. 950; *State* v. *Rose*, 40 Mont. 66, 105 P. 82.

It is just as certain, however, that such regulation would not be permitted in such manner as to unreasonably discriminate or substantially deny equal protection to those of the same class, in the exercise or control of such a business. All of the same class permitted to engage in such business must be treated substantially alike—that is, allowed substantially the same rights and privileges. *Colgate v. Harley*, 296 U. S. 404, 80 L. ed. 299, 56 S. Ct. 252. Like treatment of all persons similarly situated is all that is required by the equal protection clauses of the Federal and State Constitutions. "The fact that a statute discriminates

in favor of a certain class does not make it arbitrary if the discrimination is founded upon a reasonable distinction, or if any state of facts reasonably can be conceived to sustain it." Point 4, Headnotes, *State Board of Tax Commissioners v. Jackson*, 283 U. S. 527, 75 L. ed. 1248, 51 S. Ct. 540.

Any business which may be licensed is, of course, subjected, to some extent, to regulation. The extent of regulation permitted as to a business is often determined by the type or class of the particular business licensed. In *Ex Parte M. T. Dickey*, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F, 840, we find this langauge: "As regards legislative power or control, the business or interest regulated by the ordinance is clearly distinguishable from vocations the pursuit of which does not involve the use of public property. The right of a citizen to pursue any of the ordinary vocations, on his own property and with his own means, can neither be denied nor unduly abridged by the legislature; for the preservation of such right is the principal purpose of the constitution itself. In such cases, the limit of legislative power is regulation, and that power must be cautiously and sparingly exercised, unless the business is of such character as places it within the category of social and economic evils, such as gaming, the liquor traffic and numerous others. To this list may be added such useful occupations as may, under certain circumstances, become public or private nuisances, because offensive or dangerous to health. All of these fall within the broad power of prohibition or suppression, some wholly and absolutely and others conditionally. Such pursuits as agriculture, merchandising, manufacturing and industrial trades cannot be dealt with at will by the legislature. As to them, the power of regulation is comparatively slight, when they are conducted and carried on upon private property and with private means * * *."

As often pointed out, it is not possible to formulate any rule or measure by which equal protection provisions of the constitutional requirements may be definitely defined. Neither is it possible to lay down any rule that would determine, in each particular case, whether a legislative classification may be justified. What may be a proper classifica-

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tion as to one type of business may not be proper as to another type. Such a classification, however, must be founded upon real and pertinent differences, not upon irrelevant or artificial ones. See *Colgate v. Harley, supra; Barrett v. Indiana*, 229 U. S. 26, 57 L. ed. 1050, 33 S. Ct. 692; *Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 S. Ct. 730. In *State Board of Tax Commissioners v. Jackson, supra*, it was held; "5. A very wide discretion must be conceded to the legislature in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax." See *City of New Orleans v. Smythe*, 116 La. 685, 41 So. 33, 6 L. R. A., N. S., 722, 114 Am. St. Rep. 566; *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 25 Am. St. Rep. 863.

From the birth of this State, wagering or betting in almost every form has been regarded as of evil tendency and made illegal. See Article 10, Chapter 61, Official Code. By special statute, pari-mutuel wagering is excepted from the application of general gaming laws. Code, 19-23-21, as amended. Thus, the declared legislative policy of the State has been to prohibit or regulate wagering. It is not for the courts, of course, to determine whether that policy is justified. Legislation relating thereto is to be merely interpreted and applied by the courts, but in accordance with constitutional provisions. That the Legislature has the power, under the Constitution, to declare such policy, or to prohibit or regulate such alleged evils, has already been determined by this Court in *Ex Parte Dickey*, supra. See *Commonwealth v. Kentucky Jockey Club*, 238 Ky. 739, 38 S. W. 2d 987.

Petitioner contends that the attempt of the Legislature, in the 1953 Act, to require petitioner to submit to a local option election, discriminates against him, since the licensees of existing race tracks were not so required, and that any classification as to those licensed at the time of the effective date of the Act, and those not licensed, is arbitrary, without any reasonable basis, and not founded upon any material or logical purpose in connection with the enforcement of the Act. We do not agree. The authorities are

generally to the effect that the exception from the effect of a licensing statute of existing businesses of the type which may be prohibited or regulated does not necessarily render the statute discriminatory or unconstitutional. The rule is clearly recognized in *Mayflower Farms v. Ten Eyck*, 297 U. S. 266, 80 L. ed. 675, 56 S. Ct. 457, relied upon heavily by petitioner, in this language: "We are referred to a host of decisions to the effect that a regulatory law may be prospective in operation and may except from its sweep those presently engaged in the calling or activity to which it is directed. Examples are statutes licensing physicians and dentists, which apply only to those entering the profession subsequent to the passage of the act and exempt those then in practice, or zoning laws which exempt existing building, or laws forbidding slaughter houses within certain areas, but excepting existing establishments. The challenged provision is unlike such laws, since, on its face, it is not a regulation of a business or an activity in the interest of, or for the protection of, the public, but an attempt to give an economic advantage to those engaged in a given business at an arbitrary date as against all those who enter the industry after that date * * *." See *People v. Monroe*, 349 Ill. 270, 182 N. E. 439; *Zodrow v. State*, 154 Wis. 551, 143 N. W. 693; *Ex Parte King*, 157 Cal. 161, 106 P. 578; *City of New Orleans v. Smythe*, 116 La. 685, 41 So. 33, 6 L. R. A., N. S., 722, 114 Am. St. Rep. 566; *City of Miami v. Green*, 131 Fla. 864, 180 So. 45; *Commonwealth v. Petri*, 122 Ky. 20, 90 S. W. 987; *Marquis v. City of Waterloo*, 210 Iowa 439, 228 N. W. 870; *Sampere v. City of New Orleans*, 166 La. 776, 117 So. 827, affirmed 279 U. S. 812, 73 L. ed. 971, 49 S. Ct. 262; Annotation, *State of Wisconsin ex rel. F. W. Woolworth Co. v. State Board of Health*, 237 Wis. 638, 298 N. W. 183, 136 A. L. R. 205. Cases may be found otherwise, but usually are based upon questions arising in connection with the type of businesses which may be regulated, to some extent, but can not be prohibited. Compare: *State v. Board of Health*, 237 Wis. 638, 298 N. W. 183, (Restaurant); *State v. Mayor and Common Council*, 226 Wis. 215, 276 N. W. 311, (Restaurant); *Town of Crowley v. West*, 52 La. Ann. 526, 27 So. 53, 47 L. R. A. 652, (Livery Stable); *Los Angeles*

County v. Hollywood Cemetery Association, 115 Cal. 372, 47 P. 55, (Burial Lots); *State v. Kievman*, 116 Conn. 458, 165 A. 601, (Junk Dealer); *Town of Clinton* v. *Standard Oil Co.*, 193 N. C. 432, 137 S. E. 183, 55 A. L. R. 252, (Filling Station); *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 80 L. ed. 138, 56 S. Ct. 159, 101 A. L. R. 853, (Strawberry Containers).

To hold that a mere change in the requirements or in the procedure for the obtaining of such a license is discriminatory, would, in effect, be holding that when one Legislature, the first to act, has prescribed the requirements and procedure for the obtaining of such a license, that any subsequent Legislature would be without power to make any substantial change relating thereto. In other words, any substantial change would constitute such discrimination as to render any later enactment void. We think the applicable constitutional provisions do not have that effect. New or different requirements may become known or necessary for the proper and effective regulation of any business, and the right or power to utilize or adopt such requirements should be available to the Legislature without the necessity of destroying all existing rights of licensees by the revocation, or otherwise, of existing licenses. While the rights of such licensees are not regarded by law as being such that the licenses may not be revoked, though revocation results in property loss to the licensees, it is the prerogative of a Legislature to weigh such individual rights against the advisability or necessity of the regulation or prohibition of the business in a particular manner. In the instant case all operators of horse race tracks, licensed either before or after the 1953 Act was passed, may acquire precisely the same rights and privileges in the operation of that business, and all persons applying for construction permits under that Act have precisely the same rights and privileges.

Petitioner relies upon cases like *Mayflower Farms v. Ten Eyck, supra.* That case involved the regulation of the sale of fluid milk. The statute authorized a board to fix minimum prices of fluid milk in cities of more than one million inhabitants, but fixed a differential of one cent per quart

in favor of dealers "not having a well advertised trade name." The Act was held unconstitutional as denying equal protection of the law, for the reason that it was not shown that the differential had "any relation to public health or welfare or to operate to discourage monopoly or to be aimed at any abuse cognizable by law in the local business." We think the case not particularly applicable or controlling. In the instant case we can not say that the method of determining who may be licensed to operate horse race tracks has no "relation" to the regulation of that business. Rather, we think, the proper method of licensing such a business may be of major importance in such regulation. Certainly, the Legislature should not be prevented in succeeding in its efforts to provide a better system of licensing, or to improve an existing system.

For another reason, the existence of any discrimination is made doubtful and, where doubt exists, a statute will not be declared unconstitutional. Under Article 23, the older statute, very wide discretion was vested in the racing commission as to whether a license would issue to any applicant. No applicant was definitely entitled to any such license. Undoubtedly, the commission had the right and duty to consider the probability of the success or failure of any applicant in the operation of the business, which in turn would depend very largely upon public opinion and the attitude toward such a business in the particular vicinity. In effect, the 1953 Act does no more than remove the discretion from the racing commission and vest it in the voters of the political subdivision wherein the business is to be operated. Since the citizens of the vicinity where such a business is operated are the ones who will supposedly suffer most from the alleged evils thereof, we can not see that the Legislature did not act wisely in vesting the discretion in the voters instead of leaving matter within the discretion of the racing commission; but, wisely or not, it was within the power of the Legislature to do so. See *Haight* v. *Bell*, 41 W. Va. 19, 23 S. E. 666, 31 L. R. A. 131. Petitioner, of course, has been denied no license under the 1953 Act, since no local option election has been held in the county or counties wherein he proposes to construct a race track.

Petitioner's other contention is that the Act of 1953 is a special Act, within the meaning of Section 39 of Article VI of our State Constitution; that a general Act would have been proper, and that, therefore, the special Act is unconstitutional and void. The pertinent part of that section reads: "* * * in no case shall a special act be passed, where a general law would be proper, and can be made applicable to the case * * *." This contention is based on the theory that, since it does not apply to existing race tracks, the Act "creates a virtual monopoly of the business of conducting such race meetings in favor of the three race tracks now existing. It is perfectly obvious from this Act that it was enacted solely to delay and curtail effectively all competition with the three tracks now in existence." We think, however, this argument overlooks the fact that the Act applies to all race tracks thereafter licensed, whether in the three counties where race tracks existed or in other counties. Moreover, we can not assume that under the 1953 Act any local option election will be called, or that the voters of each of the several counties where such an election is called will reject any application for a license, so as to leave a monopoly of the particular business with the three counties. As previously noted, the Act requires the racing commission to issue a construction permit in the event no local option election is demanded, by petition of at least fifteen per cent of the voters in the particular political subdivision, within sixty days after the date of the first publication of a notice. Certainly, under the 1953 Act, other licenses may be issued. There is, we think, no tendency toward any monopoly. The fact is that an additional race track in each of the fifty-five counties of the State is possible, depending upon results of local option elections. By the illustration, however, we do not intend to indicate—it is not necessary to decide here, that the State can not limit the number of race tracks where pari-mutuel wagering may be conducted.

In 4 M. J., Constitutional Law, Section 39, we find these statements:

"Special laws are those made for individual cases, or for less than a class requiring laws appropriate to its peculiar condition and circumstances; local laws are laws special as

to place. A law is 'special' in a constitutional sense when by force of an inherent limitation it arbitrarily separates some persons, places or things from those upon which, but for such separation, it would operate. An arbitrary separation of persons, places or things of the same general class, so that some of them will and others of them will not be affected by the law, is of the essence of special legislation. What constitutes an arbitrary separation depends upon the purpose and subject of the particular act and the circumstances and conditions surrounding its passage.

"A law which bears on its face no evidence of an exclusive or discriminative purpose is prima facie valid. The test of a special law is the appropriateness of its provisions to the objects that it excludes. It is not, therefore, what a law includes that makes it special, but what it excludes. If nothing be excluded that should be contained, the law is general * * *." See 33 Am. Jur., Licenses, Section 31.

Petitioner would support his contention as to the Act of 1953 being a special Act with cases like *State ex rel. Dieringer v. Bachman*, 131 W. Va. 562, 48 S. E. 2d 420; *Truax-Traer Coal Co. v. State Compensation Commissioner*, 123 W. Va. 621, 17 S. E. 2d 330; *Brozka v. County Court*, 111 W. Va. 191, 160 S. E. 914; and *Groves v. County Court*, 42 W. Va. 587, 26 S. E. 460. In the *Bachman* case, the Act declared to be a special Act attempted to legislate as to civil service for members of the fire department of one city only, Wheeling. Clearly, a general law could have been made applicable. In fact, a general law, applying to all such fire departments, did exist. In the *Truax-Traer Coal Co.* case an Act of the Legislature attempted to permit the reopening of a claim before the State Workmen's Compensation Commissioner, after an order of the commissioner had become final. The Act applied to one claim only, clearly a special Act. A general law could have been enacted which would have applied to all like claims. The *Brozka* case held unconstitutional an attempt to relieve the taxpayers of a particular municipality of the payment of any road taxes. Again, the Act questioned was clearly a special Act, because it was made to apply to the taxpayers of only one municipality.

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A general Act could have dealt alike with all municipalities of a particular class.

In the *Groves* case, the Act held unconstitutional as being a special Act provided that to authorize the relocation of a county seat, three-fifths of all votes cast at the election held for that purpose should be necessary. But the Act contained a provision to the effect "That where the county seat of any county in this state has since the first day of January, 1872, been relocated by a special act of the legislature, in such case, if a majority of all the votes cast at said election upon the question be in favor of the relocation of the county seat at either of the places voted for, the said county court should enter an order declaring the place so receiving a majority of all the votes cast, therefore, to be the county seat of said county from and after that date." The county seat of Grant County was the only county seat relocated by an Act of the Legislature between 1872 and the date of the Act involved. The Court held: "5. To take from the past a specified period of time, and a single transaction as having occurred within that period, but by circumlocution described as a class, and then take as the characteristic of the class the peculiarity of having occurred within such past period of time, to mark and distribute the class thus apparently created and set apart as the subject-matter to be dealt with, such law, though general in appearance, is special in effect." Petitioner argues that, since the statute in the instant case does not require a local option election in the three counties where race tracks existed at the time of the passage of the 1953 Act, the Act arbitrarily created a class as to those three counties and is, in effect, a special Act. As before noted, however, the 1953 Act applies alike to all counties of the State, those wherein race tracks existed, as well as those where no tracks existed. It is true, of course, that the Act excepted from its operation the three existing race tracks but, as before noted, the Legislature was not bound to destroy the existing rights of those licensed before providing for more effective or desirable procedure for the issuance of other licenses. The existence of the three tracks, permitted to continue operation under the new Act, would just as certainly have continued under the old Act, even though petitioner had been licensed under the old Act. Therefore, we necessarily

hold that the 1953 Act is not invalid as being in violation of Section 39 of Article VI of the State Constitution.

Another principle applicable in the determination of questions of constitutionality of legislative enactments, consistently followed by this Court, and as well by the United States Supreme Court, is: "Every presumption is to be made in favor of the constitutionality of a statute, and it can never be declared unconstitutional except when it is clearly and plainly so. A reasonable doubt as to its unconstitutionality must be resolved in favor of the validity of the law." 17 M. J., Statutes, Section 29. See scores of cases cited to text. In *Booten v. Pinson*, 77 W. Va. 412, 89 S. E. 985, L. R. A. 1917A, 1244, it was held: "6. Unless the question is free from doubt, it is the duty of courts to uphold legislative acts as constitutional."

From the conclusions reached, it necessarily follows that the writ prayed for must be denied.

Writ denied.

No. 10585

NICHOLAS J. TWEEL

v.

WEST VIRGINIA RACING COMMISSION, ETC., et al.

LOVINS, *Judge*, concurring:

I concur in the result reached in this proceeding, and consider that the reasoning in the opinion fully justifies that conclusion. I think, however, that points 5, 6 and 7 of the syllabus are inaccurate in the particulars hereinafter mentioned.

The accuracy of a syllabus prefixed to an opinion of this Court should be free from doubt. Reference to cases and statutes should observe that rule of accuracy so that authorities cited in the syllabus may be located without an extended and laborious search.

The Constitution of this state provides as follows: "When a judgment or decree is reversed or affirmed by the supreme court of appeals every point fairly arising upon the record of the case shall be considered and decided; and the reasons

therefor shall be concisely stated in writing and preserved with the record of the case; and it shall be the duty of the court to prepare a syllabus of the points adjudicated in each case concurred in by three of the judges thereof, which shall be prefixed to the published report of the case." Section 5, Article VIII, Constitution of West Virginia. The language of the foregoing constitutional provision indicates to me that it places the responsibility for the syllabus prefixed to a published report of a case on this Court.

It is to be noted that the constitutional provision is directory, but should be followed. *Henry et al v. Davis*, 13 W. Va. 230, 252; *Hall & Smith v. Bank of Virginia*, 15 W. Va. 323, 335; *Horner v. Amick*, 64 W. Va. 172, 175, 61 S. E. 40. In *Horner v. Amick, supra*, this Court, speaking by Judge Brannon, held: "Several times this Court has declared that that provision of the Constitution is only directory * * *. It should be fairly applied and all points involving novel questions of law not already settled should be passed on; but I have never been able to see that it demands of this Court discussion again and again and redecision of law well settled about which there can be no dispute, where the rule of *stare decisis* applies." See *Henshaw v. Insurance Co.*, 112 W. Va. 556, 565, 166 S. E. 15. In some cases this Court has held that a syllabus is not necessary. See *Long v. Potts*, 70 W. Va. 719, 75 S. E. 62, where the Court was divided in its opinion; *Feamster v. Feamster*, 51 W. Va. 506, 41 S. E. 910, where only a question of fact depending on evidence was presented. For a similar holding, see the case of *Koonce v. Doolittle*, 48 W. Va. 592, 37 S. E. 644.

My objection to the syllabus in the instant proceeding relates to points 5, 6 and 7.

Point 5 consists of a quotation, except the references to a case reported in 283 U. S. 527. The writer of this note of concurrence has examined the official report of this case, found in 263 U. S. 527, and finds that point 5 to the headnote in the official report is not in anywise similar to the quotation contained in point 5 of the syllabus of the instant case. In the body of the opinion at page 537 of Volume 283 U. S., the following language will be found: " 'A very wide discretion must be conceded to the legislative power of the State in the

classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.' " The above quoted language is taken from the case of *Brown-Forman Co. v. Kentucky*, 217 U. S. 563. Point 5 of the syllabus in the instant proceeding will not be found in the headnote prefixed to the court's opinion, reported in 51 S. Ct. 540. But the quotation in the opinion, as set out above, will be found at page 543, Supreme Court Reporter.

Point 5 of the syllabus in the instant proceeding is an exact quotation from point 5 headnote, prefixed to the case of *State Bd. of Tax Commissioners v. Jackson*, as reported in 75 Law Ed. at page 1248. An examination of the headnote as quoted from the Law Ed. discloses some discrepancy between the headnote quoted in the instant case and that part of the opinion upon which it rests. The headnote states: "A very wide discretion must be conceded to the *legislature* * * *", whereas, the opinion states: " 'A very wide discretion * * * to the *legislative power of the state* * * *' ". It seems to me that the term "legislative power of the state" is considerably broader than the term "legislature". (emphasis supplied) The language of the 5th headnote in the instant proceeding is in no sense official, coming as it does, from a headnote prepared by a private publisher.

I object to the phrases appearing in the 6th and 7th points of the syllabus of the instant proceeding: "Now Code, 19-24". Chapters 47 and 48 of the Acts of the Legislature, 1933, First Extraordinary Session, authorizes horse racing and pari-mutuel betting, and do not, in any sense, purport to amend the Code of 1931, which is the only official code now existing in this jurisdiction. The same is likewise true of Chapter 71, Acts of the Legislature, 1935, Regular Session, amending and reenacting Chapters 47 and 48 *id.* It seems that Chapter 71 has been placed in Michies Code of 1949, a private publication, as Article 23, Chapter 19. But I fail to find any legislative authority for so designating it. The same situation prevails with respect to Chapter 158, Acts of the Legislature, Regular Session, 1947.

It is true that Chapter 112, Acts of the Legislature, Regular Session, 1953, provides that Chapter 19 of the Code of West Virginia, one thousand nine hundred thirty-one, *as amended,* (emphasis supplied) be amended by adding a new article to be designated as Article 24. This enactment of the legislature overlooks the fact that prior to the enactment of the 1953 statute, the Code of 1931 had not been amended by a formal provision of a legislative act. To refer to it as now, Code 19-24, overlooks the *hiatus* which makes for inaccuracy and incorrect reference.

Hence, this criticism, based on what I regard as three inaccuracies in the syllabus. Such inaccuracies detract from an otherwise able opinion.

APPENDIX "B"

Order of the Supreme Court of Appeals of West Virginia

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County on the 30th day of June, 1953, the following order was made and entered, to-wit:

No. 10585

STATE EX REL. NICHOLAS J. TWEEL, *Petitioner*

vs.

WEST VIRGINIA RACING COMMISSION, a Statutory Corporation, and JAMES F. EDWARDS, Chairman and Member, FRANK BROOKE, Vice-Chairman and Member, and RALPH LAPORTE, Member of West Virginia Racing Commission, *Defendants*

MANDAMUS

The Court, having maturely considered the petition, the rule awarded thereon, the defendants' answer to the petition, and the argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that the petitioner is not entitled to the peremptory writ of mandamus prayed for in his said petition. It is therefore

considered and ordered by the Court that the peremptory writ of mandamus prayed for in this proceeding, be, and the same is hereby denied and the rule heretofore awarded is discharged, and that the defendants do recover of and from the petitioner their costs about their defense in this Court in this behalf expended.

The syllabus of points adjudicated, prefixed to the written opinion prepared by Judge Given, was concurred in by Judges Haymond, Riley, Lovins and Browning. Judge Lovins reserves the right to file a concurring opinion.

Attest:

(S.) Kenneth E. Hines,
Clerk of the Supreme Court of Appeals.

APPENDIX "C"

Pertinent Sections of the West Virginia Statute in Question

Chapter 112, Acts of the Legislature of West Virginia, Regular Session, 1953

An Act to amend chapter nineteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, to be designated article twenty-four, relating to construction of race tracks for horse racing and local option elections and procedures incident thereto.

Be it enacted by the Legislature of West Virginia:

That chapter nineteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, to be designated article twenty-four, to read as follows:

Article 24. Race Tracks

Section 1. Race Track Construction Applications and Permits; Action by Racing Commission; Review.

No person, after the date on which this article becomes effective, shall construct a race track where horse race

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meetings are to be held and the pari-mutuel system of wagering conducted, as provided in article twenty-three of this chapter, unless and until such person shall first have applied for and obtained from the West Virginia racing commission a construction permit which may be issued by said commission in strict accordance with the provisions of this article, and not otherwise. Any person desiring to obtain such construction permit shall prepare and file with the West Virginia racing commission an application therefor in such form and to such effect as said commission may require or approve. Among other things, said application shall specify:

(1) The names and addresses of all persons who are financially interested in the proposed race track, including the names of all partners, if the applicant be a partnership, and of all stockholders, if the applicant be a corporation, and the names of any persons who have agreed to lend the applicant money for use in connection with such race track;

(2) The county where the race track is to be established; and

(3) Plans showing, in such detail as the commission may require, the proposed race track and all buildings and improvements to be used in connection therewith. The commission shall prescribe blank forms for use in making such application.

When such application shall have been prepared and filed in accordance with the foregoing requirements, the commission shall consider the same, and if the commission be of opinion that the applicant intends to proceed in good faith to establish a race track complying in all particulars with the laws of this state, that the plans therefor are adequate and have been prepared with due regard to the safety of all persons who will use such race track, and that the applicant is financially able to complete such race track in accordance with the plans shown on such application, the commission shall enter an order giving its tentative approval to such application, or, if the commission be not satisfied in the particulars above set forth, it shall refuse such application.

If such application be refused, the commission shall enter

an order on its records specifying the reasons for its refusal thereof and such order shall be attached to said application and both the application and such order shall be open to inspection, upon application to the commission, of anyone desiring to inspect the same. The action of the commission in refusing any application shall be subject to review by mandamus in any court of this state having jurisdiction, with the right of appeal to the supreme court of appeals in the manner prescribed by law.

If the commission shall give tentative approval to such application, it shall prepare and publish, once a week for four successive weeks in some newspaper published or of general circulation in the county in which such race track is to be established, a notice to the public that the commission has given tentative approval to the application and that the commission will confirm such tentative approval and issue a construction permit to the applicant at the expiration of sixty days from the date of the first publication of such notice (which date shall be specified in said notice), unless within said time an application for a local option election shall have been filed with the county court of the county in which said race track is proposed to be established in accordance with the further provisions of this article.

Sec. 2. Local Option Election; Form of Petition therefor.

The county court of the county in which a proposed race track is to be established is hereby authorized to call a local option election for the purpose of determining the will of the voters within said county as to the establishment of such race track, as hereinafter provided.

A petition for such local option election shall be in the form hereinafter specified and shall be signed by qualified voters residing within said county equal at least to fifteen per cent of the persons qualified to vote within said county at the last general election. Said petiton may be in any number of counterparts and shall be filed with said county court period to the expiration of the sixty-day period specified in the notice published by the West Virginia racing commission in accordance with the provisions of the next

preceding section of this article. Said petition shall be sufficient if substantially in the following form:

PETITION FOR LOCAL OPTION ELECTION RESPECTING THE ESTABLISHMENT OF A RACE TRACK IN —— COUNTY, WEST VIRGINIA

Each of the undersigned certifies that he or she is a person residing in —— County, West Virginia, and is duly qualified to vote in said county under the laws of said state, and that his or her name, address and the date of signing this petition are correctly set forth below.

The undersigned petition said county court to call and hold a local option election as required by chapter 19, article 24 of the code of West Virginia, as amended by the Legislature of said State at its 1953 Session, upon the following question: Shall the West Virginia Racing Commission issue a construction permit authorizing the establishment of a race track where horse race meetings may be held and the pari-mutuel system of wagering conducted in —— County, West Virginia?

Name	Address	Date
.....	.....	.....
.....	.....	.....
.....	.....	.....

(Each person signing must specify either his post office address or his street number.)

Sec. 3. Local Option Election Procedure.

Upon the filing of a petition for a local option election in accordance with the provisions of the next preceding section, the county court shall enter an order calling a local option election and providing that the same shall be held at the same time and as a part of the next primary or general election to be held in said county. A copy of the order so entered by the county court shall be served upon the West Virginia racing commission and that commission shall take no further action in connection with the issuance of such construction permit until said local option election shall be

held. Said county court shall give notice of such local option election by publication in two newspapers of opposite politics and of general circulation within said county. Said notice shall be given at least once each week for two successive weeks prior to the date of said election. If there is only one newspaper published in said county, publication of said notice therein shall be sufficient.

Each person qualified to vote in said county at said primary or general election shall likewise be qualified to vote at the local option election. The election officers appointed and qualified to serve as such at said primary or general election shall conduct said local option election in connection with and as a part of said primary or general election. The ballots in said local option election shall be counted and returns made by the election officers and the results certified by the commissioners of election to said county court which shall canvass the ballots, all in accordance with the laws of the state of West Virginia relating to primary and general elections insofar as the same are applicable. The county court shall, without delay, canvass the ballots cast at said local option election and certify the results thereof to the West Virginia racing commission and thereupon said commission shall issue or refuse to issue the construction permit in accordance with the results of such local option election.

Sec. 4. Form of Ballot.

The ballot to be used in said local option election shall have printed thereon substantially the following:

Shall the West Virginia racing commission issue a construction permit authorizing the construction in —— County, West Virginia, of a race track where horse race meetings may be held and the pari-mutuel system of wagering conducted?

☐ Yes ☐ No

(Place a cross mark in the square opposite your choice.)

Sec. 5. Further Elections Restricted

When a local option election in accordance with this article shall have been held in a county, another such elec-

tion shall not be held in said county for a period of five years, and within that time the West Virginia racing commission shall not receive or act upon any application for any other construction permit within said county. In the event a race track shall be constructed in a county pursuant to a construction permit issued by the West Virginia racing commission in accordance with the provisions of this article, no local option election shall thereafter be held as to any race track constructed pursuant to such construction permit.

Sec. 6. Race Tracks Already Established; Applicability.

Nothing herein contained shall apply to any race track heretofore established in the state of West Virginia and at which races have been conducted by the owners or operators thereof under and in pursuance of licenses issued by the West Virginia racing commission in accordance with the provisions of article twenty-three of this chapt r. The establishment of any new or additional race track within a county in West Virginia in which a race track has heretofore been established and operated under licenses issued by the West Virginia racing commission, whether by the persons owning and operating such existing race track or others, shall be subject to the provisions of this article.

This article is supplementary and in addition to article twenty-three of this chapter and nothing herein contained shall relieve the person desiring to conduct a horse race meeting, where the pari-mutuel system of wagering is followed, at either an existing race track or one which shall be hereafter established, of the necessity of securing the license therefor and otherwise complying with all of the terms, provisions and conditions of article twenty-three of this chapter.

Sec. 7. Definition of Terms; Inconsistent Laws Repealed.

When used in this article, the following terms shall have the following meanings:

"West Virginia racing commission" or "the commission" refer to the corporation by that name created by article twenty-three of this chapter.

"Pari-mutuel" is a French word meaning "a mutual or collective pool that can be divided among those who have contributed their wagers to one central agency, the odds to be reckoned in accordance to the collective amounts wagered upon each contestant running in a race upon which the pool is made, but the total to be divided among the first three contestants on the basis of the number of wagers on these."

All other laws, whether general or local, public or private, or previous grants or franchises, inconsistent with the provisions of this article are hereby repealed.